Parti Islam Se-Malaysia & Ors v Tan Sri Dato' Seri Abdul Aziz bin Mohd Yusof & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-72–02 OF 2014
ALIZATUL KHAIR, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
10 JUNE 2015

Election — Election Commission — Whether EC members failed in constitutional duty to properly conduct 13th General Election ('GE13') — Coalition of opposition parties alleged EC's failure to ensure proper use of indelible ink to prevent multiple voting compromised results of GE13 to their detriment — Claim for various declaratory reliefs and orders including setting aside of results of GE13 as null and void filed as civil action in High Court — Whether High Court had jurisdiction to hear matter — Whether essence of claim challenged result of GE13 and was within sole jurisdiction of election court — Federal Constitution art 118 — Whether declaratory orders alone could be granted without consequential relief — Whether pleading of various causes of action to bring matter within civil jurisdiction of High Court attempt to circumvent and violate art 118

The first three appellants belonged to the coalition of opposition parties called Pakatan Rakyat. The fourth, fifth and sixth appellants were Pakatan Rakyat's unsuccessful candidates in the 13th General Election ('GE13') while the seventh and eighth appellants were registered voters in GE13. The respondents were members of the Election Commission ('EC'). The appellants sued the respondents in the High Court alleging they had breached their constitutional and statutory duties in failing to properly conduct GE13; in particular, that the failure/misuse of indelible ink to prevent a voter voting more than once compromised the fair outcome of GE13 to the appellants' detriment. In their action, the appellants sought declarations that (a) the respondents failed in their constitutional duty and obligation to properly conduct GE13 and (b) they had maliciously and dishonestly practised fraud on the electorate by the misuse of indelible ink for voting purposes. Apart from the two declarations, the appellants wanted the entire results of the GE13 for all parliamentary seats to be declared, and set aside, as null and void. They also sought an order that the respondents be removed from office as members of the EC and an order that a newly constituted EC conduct fresh general elections for all parliamentary seats. The respondents successfully applied to strike out the appellants' action under O 18 r 19 of the Rules of Court 2012 ('the ROC') on the ground it was frivolous, vexatious and an abuse of process of court. The High Court held that the essence of the plaintiff's claim was to seek an order declaring the results of GE13 as null and void and that the pleading of various

causes of action against the respondents was merely to lay the foundation for asking for such an order. The High Court agreed with the respondents that under art 118 of the Federal Constitution ('the Constitution'), the High Court in its original civil jurisdiction did not have jurisdiction to grant the reliefs sought by the appellants; that the only way election results could be challenged was by way of an election petition brought before an election judge as prescribed under the Election Offences Act 1954. The court also agreed that it had no power or jurisdiction to order the removal of the respondents from office as art 114(3) of the Constitution provided that members of the EC could only be removed from office on like grounds and in like manner as a judge of the Federal Court was removed from office. The appellants contended that the High Court had jurisdiction to hear the writ action because the causes of action pleaded (such as breach of constitutional duties and obligations, breach of fundamental liberties, torts of fraud, deceit, conspiracy and misfeasance by a public officer) and the various remedies sought were outside the scope of an election petition and of art 118 and could not be granted by an election court.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) It was unequivocally clear from the language of art 118 of the Constitution that an election could only be questioned by an election judge trying an election petition. The effect of that provision was that the High Court was excluded from exercising any jurisdiction over all matters that called into question an election be it to the House of Representatives or to the State Assembly. The appellants vide their civil suit in effect called into question or challenged the results of GE13. The claim therefore fell squarely within the scope of art 118 and as such could only be brought by way of an election petition before an election judge and not by way of a civil suit before a judge exercising his or her ordinary civil jurisdiction (see paras 41–42).

(2) The mere pleading of the (various) causes of action could not confer jurisdiction on the High Court as the effect of those causes of action and the reliefs sought was to call into question the elections (ie GE13) which by virtue of art 118 was vested solely with the election court. Any attempt to confer jurisdiction on the High Court by pleading such causes of action would amount to a violation of art 118 (see para 48).

(3) The court could not agree with the appellants' contention that because they sought to challenge the entire results of GE13 (and not the result in a specific constituency), art 118 could not apply and recourse could only be had to filing a civil action in the High Court to declare the results of GE13 null and void. What art 118 and the Election Offences Act 1954 contemplated was election from each constituency and it was that election that was liable to be challenged by filing an election petition. Even where, in form, the challenge was to the elections as a whole, in

effect and substance, what was challenged was election from each constituency, and art 118 must therefore be held to be attracted (see paras 58–61).

(4) It was clear from art 114(3) of the Constitution that the High Court had no jurisdiction to remove members of the EC from office. In like manner as a judge of the Federal Court was removed from office, the jurisdiction to remove members of the EC was vested with the Yang di-Pertuan Agong acting on the recommendation of a tribunal set up for that purpose. In any event, the issue did not arise in the instant case as the High Court was bereft of jurisdiction to hear the appellants' claim pursuant to art 118 of the Constitution (see paras 70 & 73–75).

(5) The appellants' argument was untenable that even if the court did not have jurisdiction to grant an order declaring the results of GE13 null and void, it nevertheless had jurisdiction to grant the first two 'self-standing' declarations sought in the statement of claim. Both prayers (1) and (2) of the statement of claim could not stand independently and if they were granted, the ultimate effect of the orders would be to render GE13 null and void and as such would attract the provisions of art 118 of the Constitution (see paras 63–65).

(6) (per **Prasad Abraham JCA**, dissenting) This was not a fit and proper case for summary disposal by way of O 18 r 19 of the ROC. Prayer (1) of the appellant's statement of claim (seeking a declaration that each of the defendants, either acting individually or collectively as the EC, jointly or severally, failed in their constitutional duty and obligation to properly conduct GE13) could stand on its own as it sought a purely declaratory order without any consequential relief. Seeking a declaration of rights without consequential relief should be encouraged since the law under s 41 of the Specific Relief Act 1950 allowed the same (see paras 81, 84 & 86).

(7) (per **Prasad Abraham JCA**, dissenting) It was open to the appellants to seek a declaration that the respondents had breached their constitutional duty to conduct GE13 with fairness. The Federal Constitution, as the supreme law of the Federation, imposed a constitutional duty on the respondents to conduct elections in accordance with art 113 of the Constitution read together with the Elections Act 1958 and its regulations. The said Elections Act provided, inter alia, that the EC shall 'enforce on the part of all election officers fairness, impartiality and compliance with Part VIII of the Constitution and this Act and any regulations made thereunder'. The appellants' argument was, therefore, a sustainable one, that whilst it was open to mount a claim against the respondents on the basis of a declaration, but where the election process was challenged and where an election result was to be avoided, then only you had to proceed by way of an election petition. The issue raised was an

important one which could not be summarily disposed of (see paras 81–83).

(8) (per **Prasad Abraham JCA**, dissenting) As this was an application to strike out the claim, the court's duty was to save the pleadings by amendment rather than striking it out. Accordingly, the order of the High Court should be varied to allow the reinstatement of only prayer (1) of the appellants' statement of claim and the matter be remitted back to the High Court for case management and the parties be at liberty to amend their respective pleadings (see paras 81 & 87).

[Bahasa Malaysia summary

Tiga perayu pertama adalah daripada gabungan parti pembangkang yang dikenali sebagai Pakatan Rakyat. Perayu keempat, kelima dan keenam ialah calon yang tidak berjaya Pakatan Rakyat pada Pilihan Raya Umum ke-13 ('PRU13') manakala perayu ketujuh dan kelapan adalah pengundi berdaftar di PRU13. Responden adalah anggota Suruhanjaya Pilihan Raya ('SPR'). Perayu menyaman responden di Mahkamah Tinggi mendakwa bahawa mereka telah melanggar tugas perlembagaan dan statutori mereka apabila gagal untuk menjalankan PRU13 dengan betul; khususnya, bahawa kegagalan/salah guna dakwat kekal untuk mengelakkan pengundi mengundi lebih daripada sekali mengkompromi undi PRU13 yang adil untuk merugikan perayu dan melihat parti pemerintah yang kembali berkuasa dengan majoriti 133 kerusi daripada 222 kerusi di Parlimen. Pakatan Rakyat menegaskan bahawa ia kehilangan kira-kira 43 kerusi dengan margin yang sedikit kurang daripada 10 undi. Dalam tindakan mereka, perayu memohon deklarasi bahawa (a) responden gagal dalam tugas perlembagaan mereka dan kewajipan untuk menjalankan PRU13 dengan betul dan (b) telah berniat jahat dan tidak jujur mengamalkan penipuan ke atas pengundi dengan penyalahgunaan dakwat kekal untuk tujuan mengundi. Akibatnya, perayu-perayu mahu keseluruhan keputusan PRU13 untuk semua kerusi parlimen yang akan diisytiharkan batal dan tidak sah, suatu perintah bahawa keputusan diketepikan, perintah bagi penyingkiran responden daripada jawatan sebagai ahli SPR dan memerintahkan bahawa SPR yang baru ditubuhkan menjalankan pilihan raya umum baru bagi semua kerusi Parlimen. Responden berjaya memohon untuk membatalkan tindakan perayu di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 kerana menjadi remeh dan menyusahkan serta menyalahgunakan proses mahkamah. Mahkamah Tinggi mendapati bahawa inti pati tuntutan plaintif adalah untuk mendapatkan suatu perintah mengisytiharkan keputusan PRU13 sebagai batal dan tidak sah dan bahawa pliding pelbagai punca tindakan terhadap responden adalah semata-mata untuk meletakkan asas untuk meminta perintah sedemikian. Mahkamah Tinggi bersetuju responden di bawah perkara 118 Perlembagaan Persekutuan ('Perlembagaan'), Mahkamah Tinggi menjalankan bidang kuasa sivil asalnya tidak mempunyai bidang kuasa untuk memberikan relief diminta oleh perayu; bahawa satu-satunya cara keputusan pilihan raya

A boleh dicabar adalah melalui petisyen pilihan raya dibawa ke hadapan seorang hakim pilihan raya seperti yang ditetapkan di bawah Akta Kesalahan Pilihan Raya 1954. Mahkamah juga bersetuju bahawa ia tidak mempunyai kuasa atau bidang kuasa untuk memerintahkan penyingkiran responden dari pejabat menurut perkara 114(3) Perlembagaan memperuntukkan bahawa ahli-ahli B SPR hanya boleh dipecat daripada jawatan atas alasan dan mengikut cara yang sama seperti seorang hakim Mahkamah Persekutuan yang dipecat daripada jawatan. Perayu berhujah bahawa Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar tindakan writ itu kerana sebab-sebab tindakan mereka yang didakwa (seperti pelanggaran tugas perlembagaan dan tanggungjawab, C melanggar kebebasan asasi, tort penipuan, penipuan, konspirasi dan kesalahan yang dilakukan oleh seorang pegawai awam) dan remedi pelbagai mereka dipohon di luar skop sesuatu petisyen pilihan raya dan perkara 118 dan tidak dapat ditentukan dan diberikan oleh mahkamah pilihan raya.

D

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Ia adalah tanpa ragu-ragu jelas dari bahasa perkara 118 Perlembagaan bahawa pilihan raya hanya boleh dipersoalkan oleh hakim pilihan raya E yang membicarakan petisyen pilihan raya. Kesan daripada peruntukan itu adalah bahawa Mahkamah Tinggi telah dikecualikan daripada menjalankan apa-apa bidang kuasa ke atas semua perkara-perkara pilihan raya yang dipersoalkan sama ada Dewan Rakyat atau ke Dewan Undangan Negeri. Perayu melalui saman sivil mereka sebenarnya F mempersoalkan atau mencabar keputusan PRU13. Tuntutan itu jatuh tepat dalam skop perkara 118 dan oleh itu hanya boleh dibawa melalui petisyen pilihan raya di hadapan hakim pilihan raya dan bukan melalui saman sivil di hadapan hakim yang menjalankan bidang kuasa sivil biasa nya (lihat perenggan 41–42).

G

(2) Pliding itu semata-mata (pelbagai) kausa tindakan tidak boleh memberi bidang kuasa kepada Mahkamah Tinggi sebagaimana kesan kausa tindakan dan relief yang dipohon adalah untuk mempertikaikan pilihan raya (iaitu PRU13) yang menurut kuasa perkara 118 terletak H semata-mata di mahkamah pilihan raya. Apa-apa percubaan untuk memberikan bidang kuasa kepada Mahkamah Tinggi melalui pliding kausa tindakan sebegitu akan terjumlah kepada pelanggaran perkara 118 (lihat perenggan 48).

(3) Mahkamah tidak boleh bersetuju dengan hujah perayu bahawa kerana I mereka memohon untuk mencabar keseluruhan keputusan PRU13 (bertentangan dengan keputusan di sebuah kawasan tertentu), perkara 118 tidak boleh digunakan dan jalan keluar hanya boleh dengan memfailkan tindakan sivil di Mahkamah Tinggi untuk mengisytiharkan PRU13 terbatal dan tidak sah. Apa yang dipertimbangkan perkara 118

dan Akta Kesalahan Pilihan Raya 1954 adalah pilihan raya dari setiap kawasan dan ia adalah pilihan raya yang bertanggungan dicabar dengan memfailkan petisyen pilihan raya. Malah di mana, dalam bentuk, cabaran ini adalah untuk pilihan raya secara keseluruhan, yang berkuat kuasa dan bahan, apa yang dicabar adalah pilihan raya dari setiap bahagian pilihan raya, dan perkara 118 oleh itu mesti digunakan untuk terpakai (lihat perenggan 58–61).

(4) Ia adalah jelas daripada perkara 114 (3) Perlembagaan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk membuang anggota SPR dari pejabat. Dengan cara yang sama seperti seorang hakim Mahkamah Persekutuan telah dipecat daripada jawatan, bidang kuasa untuk mengeluarkan ahli-ahli SPR adalah terletak pada Yang di-Pertuan Agong yang bertindak atas syor tribunal ditubuhkan bagi maksud itu. Dalam apa-apa jua keadaan, isu ini tidak timbul dalam kes ini oleh Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar tuntutan perayu menurut perkara 118 Perlembagaan (lihat perenggan 70 & 73–75).

(5) Hujahan perayu-perayu tidak dapat dipertahankan walaupun mahkamah tidak mempunyai bidang kuasa untuk memberi perintah mengisytiharkan keputusan PRU13 adalah batal dan tak sah, ia walau bagaimanapun mempunyai bidang kuasa untuk memberikan dua perisytiharan pertama 'self-standing' yang dipohon dalam pernyataan tuntutan. Kedua-dua permohonan (1) dan (2) pernyataan tuntutan tidak dapat dipertahankan dengan mudah dan jika ia diberikan, kesan utama perintah akan menyebabkan PRU13 batal dan tak sah dan oleh itu akan membangkitkan peruntukan perkara 118 Perlembagaan (lihat perenggan 63–65).

(6) (oleh **Prasad Abraham HMR**, menentang) Ini bukan kes yang layak dan sesuai untuk ringkasan pelupusan melalui A 18 k 19 KKM. Permohonan (1) kenyataan perayu tuntutan (memohon diisytiharkan bahawa setiap defendan, sama ada bertindak secara berseorangan atau kolektif sebagai SPR, secara bersama atau berasingan, gagal dalam tugas perlembagaan dan kewajipan mereka untuk betul menjalankan PRU13) boleh berdiri sendiri kerana ia memohon satu perintah pengisytiharan semata-mata tanpa apa-apa relief berbangkit. Memohon pengisytiharan hak tanpa relief berbangkit perlu digalakkan sejak undang-undang di bawah s 41 Akta Relief Spesifik 1950 membenarkan yang sama (lihat perenggan 81, 84 & 86).

(7) (oleh **Prasad Abraham HMR**, menentang) Ia terbuka kepada perayu-perayu untuk mendapatkan pengisytiharan bahawa responden telah melanggar kewajipan perlembagaan mereka untuk menjalankan PRU13 dengan adil. Perlembagaan, sebagai undang-undang utama Persekutuan, mengenakan kewajipan perlembagaan kepada responden

untuk menjalankan pilihan raya mengikut perkara 113 Perlembagaan yang dibaca bersama dengan Akta Pilihan Raya 1958 dan peraturan-peraturannya. Akta Pilihan Raya tersebut memperuntukkan, antara lain, bahawa SPR akan 'enforce on the part of all election officers fairness, impartiality and compliance with Part VIII of the Constitution and this Act and any regulations made thereunder'. Hujah perayu adalah, oleh itu, hujah yang mampan, bahawa walaupun ia adalah terbuka kepada sokongan tuntutan terhadap responden berdasarkan perisytiharan, tetapi di mana proses pilihan raya telah dicabar dan jika sesuatu keputusan pilihan raya itu perlu dielakkan, maka hanya ketika itu anda terpaksa meneruskan melalui petisyen pilihan raya. Isu yang dibangkitkan adalah satu yang penting yang tidak dapat terus dilupuskan (lihat perenggan 81–83).

(8) (oleh **Prasad Abraham HMR**, menentang) Oleh kerana ini adalah satu permohonan untuk membatalkan tuntutan itu, tugas mahkamah adalah untuk menyelamatkan pliding dengan pindaan dan bukannya membatalkannya. Oleh itu, perintah Mahkamah Tinggi perlu diubah untuk membenarkan kemasukan semula hanya permohonan (1) pernyataan tuntutan perayu dan perkara itu akan diremitkan ke Mahkamah Tinggi untuk pengurusan kes dan pihak-pihak adalah bebas untuk meminda pliding masing-masing (lihat perenggan 81 & 87).]]]]]]

Notes

For cases on Election Commission in general, see 6 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2116–2119.

Cases referred to

Devan Nair v Yong Kuan Teik [1967] 1 MLJ 261, PC (refd)
Election Commission, Malaysia v Abdul Fatah bin Haji Haron [1987] 2 MLJ 716, SC (refd)
Hamid bin Hassan v Returning Officer, Karak and Ors [1979] 2 MLJ 183 (refd)
Hugh Saik Meng & Anor v Daing Ibrahim [1975] 4 MC 275 (refd)
Indrajit Barua v Election Commission of India AIR 1984 SC 1912, SC (refd)
Muhammad Sanusi bin Md Nor v Mohd Tajuddin bin Abdullah & Ors [2008] MLJU 570; [2009] 1 CLJ 1, FC (refd)
Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd [1997] 1 MLJ 557, CA (refd)
NP Ponnuswami v Returning Officer, Namakkal Constituency & Ors AIR 1952 SC 64, SC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Tengku Korish v Mohamed bin Jusoh [1970] 1 MLJ 6 (refd)

Theberge v Laudry (1876) 2 App Cas 102, PC (refd)
Union of India v Association for Democratic Reforms [2002] 5 SCC 294, SC (refd)
Yong Kuan Teik v Devan Nair [1965] 2 MLJ 162, FC (refd)

Legislation referred to

Election Offences Act 1954 ss 2, 32, 33, 33(1)
Federal Constitution arts 114(3) 113(i) 118 125(3) Part II Article 329(b)
Constitution of India [IND] arts 329(b), 226
Courts of Judicature Act 1964 s 25, Schedule para 1
Representation of the Peoples Act 1951 [IND]
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(a), (b), (d)
Specific Relief Act 1950 s 41

Appeal from: Civil Suit No 22 NCVC-451–07 of 2013 (High Court, Kuala Lumpur)

Tommy Thomas (Ambiga Sreenevasan, Americk Sidhu and Michelle Kummar with him) (Tommy Thomas) for the appellants.
Amarjit Singh (Suzana Atan with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Alizatul Khair JCA:

[1] This is an appeal by the appellants (the plaintiffs) against the decision of the learned High Court judge who had struck out the plaintiffs' writ and statement of claim pursuant to an application by the respondents (the defendants) under O 18 r 19(1)(a) and (b) of the Rules of Court 2012.

BRIEF BACKGROUND

[2] The plaintiffs herein brought this action against the Elections Commission (the defendants herein who are sued as members of the Elections Commission) alleging conspiracy and fraud in relation to the use of indelible ink in the 13th General Elections ('GE13').

[3] It is an undisputed fact that the GE13 which was held on 5 May 2013 saw the ruling party ('the Barisan Nasional') returned to power with a majority of 133 seats out of a total of 222 seats in Parliament.

[4] The opposition, a loosely formed coalition known as Pakatan Rakyat, comprising of the Parti Islam Se-Malaysia ('PAS'), the Democratic Action Party ('DAP') and the Parti Keadilan Rakyat ('PKR') lost approximately 43

seats in the GE13 with allegedly relatively narrow margins of less than ten votes.

[5] The plaintiffs alleged that the failure of the indelible ink which was intended to prevent multiple voting by dishonest voters was caused solely by the defendants' breach of their constitutional duty to properly conduct the GE13. The plaintiffs further alleged that the defendants have practiced fraud on the electorate by the misuse of the indelible ink.

[6] The plaintiffs contended that the failure of the indelible ink rendered the election results null and void.

THE PLAINTIFFS' ACTION

[7] Pursuant to the above, the plaintiffs filed this action. The plaintiffs in this action comprised the following:

(a) PAS, DAP and PKR (the first, second and third plaintiffs respectively);

(b) the unsuccessful candidates nominated by their respective parties to represent Pakatan Rakyat in the GE13 ie the fourth, fifth and sixth plaintiffs; and

(c) the registered voters in the GE13 ie the seventh and eight plaintiffs.

[8] The reliefs sought by the plaintiffs in this action are, inter alia, the following:

(a) a declaration that the defendants whether acting individually or collectively as the Elections Commission, failed in their constitutional duty and obligation to properly conduct the GE13;

(b) a declaration that the defendants whether acting individually or collectively as the Elections Commission maliciously and dishonestly practiced fraud on the Malaysian electorate by the misuse of indelible ink for voting in the GE13;

(c) by reason of the aforesaid action and omissions of the defendants, a declaration that the results of the GE13 for all the 222 parliamentary seats be declared null and void;

(d) in consequence of the above, an order setting aside the results for all the 222 parliamentary seats in the GE13;

(e) in consequence of the defendants' aforesaid conduct, an order that each of the defendants be removed from office as members of the Elections Commission;

(f) an order that a newly constituted Elections Commission conduct fresh general elections for all the 222 parliamentary seats; and

(g) exemplary damages.

[9] A perusal of the plaintiffs' claim reveal that the plaintiffs' entire action concerns the manner in which the elections (ie GE13) were conducted by the Elections Commission, the chief complaint being the use of the indelible ink. In this regard, the plaintiffs' pleaded causes of actions were essentially as follows:

(a) violation of fundamental liberties vis a vis the fourth to the eight plaintiffs 'by the massive cheating occasioned by the misuse of indelible ink';

(b) fraud by the use of washable ink which facilitated multiple voting to the detriment of the plaintiffs, (para 85 of the statement of claim);

(c) conspiracy by the defendants, the defendants' staff and persons unknown in enabling the use of the indelible ink, (para 86 of the statement of claim);

(d) that by the matters aforesaid, the defendants had acted in breach of their constitutional and statutory duties, (para 85 of the statement of claim); and

(e) that by the matters aforesaid, each of the defendants had committed the tort of misfeasance by a public officer.

THE STRIKING OUT APPLICATION

[10] The defendants contended that the plaintiffs' action is 'frivolous and vexatious' or 'an abuse of the process of court' and hence ought to be struck out pursuant to O 18 r 19(1)(b) and (d) of the Rules of Court 2012. As stated by the learned judge in her judgment, the defendants' application under the said order was premised on two main grounds:

(a) that according to art 118 of the Federal Constitution the only method to challenge election results is by way of an election petition and not by moving this court under its original civil jurisdiction as it is done here; and

(b) that this court has no power and jurisdiction to make an order removing the defendants from office as art 114(3) of the Federal Constitution provides that members of the Elections Commission can only be removed on the like grounds and in the like manner as that of a judge of the Federal Court.

A DECISION OF THE HIGH COURT

[11] The learned judge found that the court did not have the jurisdiction to grant the reliefs sought by the plaintiffs. Her Ladyship held that the plaintiffs were bound by art 118 of the Federal Constitution and the Election Offences Act 1954 in that any challenge to the elections in respect of any of the 222 seats of Parliament must be by way of an election petition to an election judge.

[12] The learned judge also held that by virtue of art 114(3) of the Federal Constitution the court did not have the necessary jurisdiction to order the removal of the defendants as members of the Elections Commission for their alleged fraud and breach of constitutional duties. The said article stipulates that members of the Elections Commission can only be removed from office 'on the like grounds and in the like manner as a judge of a Federal Court'. that is by a tribunal appointed by the Yang di- Pertuan Agong.

[13] For the above reasons, the learned judge found the plaintiffs' claim to be obviously sustainable and she accordingly ordered it to be struck out under O 18 r 19(1)(b) or (d) of the Rules of Court 2012.

E ISSUES

[14] As pointed out by learned senior federal counsel ('SFC') in his written submission the issues raised by the plaintiffs in their memorandum of appeal may be summarised as follows:

(a) Whether the High Court has jurisdiction to question an election by way of a writ action where:

(i) a breach of constitutional duty and fundamental liberties is alleged against the Elections Commission; and

(ii) fraud, deceit, conspiracy and misfeasance by a public officer is alleged. (First Issue)

(b) Whether the principle in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 to mould the relief in accordance with the demands of justice applies in this case. (Second Issue)

(c) Whether the High Court has jurisdiction to make an order removing the members of the Elections Commission from their office. (Third Issue)

THE PLAINTIFFS' SUBMISSION

First issue

[15] The plaintiffs contended that the learned judge erred in concluding that based on art 118 of the Federal Constitution, (art 118) the proper and correct method in commencing this action is by way of an election petition presented separately to the election courts where the respective election was held and as such the court did not have the necessary jurisdiction to hear the plaintiffs' suit. In the plaintiffs' view the learned judge fell into error in construing art 118 in such broad and general terms so as to oust the High Court's general jurisdiction to hear the matter.

[16] Article 118 merely provides that:

(a) any challenge to an election result in a specific constituency for a parliamentary seat or a state seat in both general elections and by-election must be by way of an election petition to an election court; and

(b) following from the above the only remedy available to a petitioner who succeeds in his election petition is for the election court to nullify the election results and order a reelection.

[17] The crux of the plaintiffs' complaint in this civil suit is 'the absolute abuse or misuse of indelible ink by the Elections Commission which resulted in multiple voting on a substantial scale, which in this case caused 43 parliamentary seats to be fraudulently counted to the detriment of the plaintiffs'.

[18] The plaintiffs' causes of action therefore involve, inter alia, breaches by the defendant of their constitutional duties and obligations.

[19] These causes of action can only be brought by way of a writ and not an election petition under art 118 as they fall outside the scope of the said article.

[20] For the same reason the plaintiffs argued that the remedies they sought in their civil suit, that is, inter alia, a declaration that the Elections Commission and its members failed in their constitutional duty to properly conduct the GE13 and a declaration that the Elections Commission and its members maliciously and dishonestly practiced fraud on the electorate, can never be granted by the election court.

A THE DEFENDANTS' SUBMISSION

[21] The defendants, on the other hand, contended that the High Court does not have any jurisdiction to try any matter questioning an election to the Legislative Assembly.

B

[22] Their contention is based primarily on the language of art 118 which according to the defendant is 'couched in imperative and absolute terms'.

C **[23]** Article 118 reads as follows:

> *No election* to the House of Representations or to the Legislative Assembly of a state *shall be called in question except by an election petition* presented to the High Court having jurisdiction where the election was held.

D

[24] It is clear from the above provision that an election can only be called into question by an election judge hearing an election petition.

[25] In this regard the Election Offences Act 1954 is the relevant law E governing election petitions and the appointment and powers of an election judge (see ss 2, 32 and 33 of the said Act). Other than the said Act there is no other written law including the Courts of Judicature Act 1964 that confers jurisdiction on the High Court to question an election to the Legislative Assembly.

F

[26] Thus the mere pleading of the causes of actions such as breach of fundamental liberties and the torts of fraud, deceit, conspiracy and misfeasance by a public officer as was done by the plaintiffs, in this suit cannot confer any jurisdiction on the High Court in the face of the clear words of art 118.

G

[27] The exclusive jurisdiction of the election court to hear any challenge to an election is reflected in the judgment of the Supreme Court in the case of the *Election Commission, Malaysia v Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716 when it held that:

H

> Any dissatisfaction with or challenge to an election should be brought up by way of an election petition before an election judge and nowhere else.

[28] The defendants also referred to the case of *NP Ponnuswami v Returning* I *Officer, Namakkal Constituency & Ors* AIR 1952 SC 64 in which the Supreme Court of India dismissed an application for certiorari to quash the decision of a returning officer rejecting the applicant's nomination papers. In doing so the Supreme Court held that art 329(b) of the Constitution of India (which is equivalent to our art 118) was intended primarily to oust the jurisdiction of all

courts in relation to electoral matters and to provide the only mode in which an election can be challenged.

[29] The other reason advanced by the defendants (in support of their contention) is that the jurisdiction to question an election is unknown to the common law and equity.

[30] Prior to the passing of legislation conferring jurisdiction to independent tribunals, the jurisdiction to question an election lie with the House of Commons. This type of legislation was described by the Privy Council in *Theberge v Laudry* (1876) 2 App Cas 102 and followed by the Federal Court in *Yong Kuan Teik v Devan Nair* [1965] 2 MLJ 162 (FC) it held as follows:

> These two Acts of Parliament ... are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating and entirely new, and up to that time unknown, jurisdiction in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly...

[31] The Privy Council in *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261, subsequently affirmed this position.

[32] The case of *NP Ponnuswami* is authority for the above proposition and has been followed by our courts in *Tengku Korish v Mohamed bin Jusoh* [1970] 1 MLJ 6 and *Hamid bin Hassan v Returning Officer, Karak and Others* [1979] 2 MLJ 183.

[33] The Federal Court in the fairly recent case of *Muhammad Sanusi bin Md Nor v Mohd Tajuddin bin Abdullah & Ors* [2008] MLJU 570; [2009] 1 CLJ 1 cited with approval the aforesaid cases and reiterated the legal position as articulated by Hashim Yeop Sani (as he then was) in *Hugh Saik Meng & Anor v Daing Ibrahim* [1975] 4 MC 275 which was as follows:

> The right of a person conferred under the law relating to election is a special statutory right conferred by a special statute and this right has its origin in the special statute itself and not under the common law or equity. The Legislature has created a special tribunal for the purpose of trying Election Petitions and the jurisdiction is a peculiar jurisdiction.

A OUR VIEW

First issue

(a) Whether the High Court has jurisdiction to question an election by way of a writ action where:

B

(i) a breach of constitutional duty and fundamental liberties is alleged against the Elections Commission; and

(ii) fraud, deceit, conspiracy and misfeasance by a public officer is alleged.

C

[34] On this issue we are in complete agreement with the learned judge's finding that '... the purpose and the pit and substance of the plaintiff's claim is to seek an order to declare the 13th GE as null and void. The alleged breach of constitutional duty and obligation of the Elections Commission or the defendants and the alleged use of the indelible ink merely provide the basis or the foundation that will be relied upon by the plaintiffs for asking such an order'.

D

E **[35]** The learned judge rightly concluded that 'the proper and correct method in challenging the said election is through an election petition ...' and as such the court did not have the necessary jurisdiction to hear the plaintiff's suit.

F **[36]** The main complaint of the plaintiff in this suit is the 'absolute abuse or misuse of indelible ink' during the recent GE13 which according to them, resulted in multiple voting on a massive scale and ultimately caused the plaintiff to lose 43 parliamentary seats in the GE13.

G **[37]** The failure of the indelible ink, the plaintiffs contended, was caused primarily if not solely by the defendants' breach of their duties and obligations under the Constitution which breach vitiated the election results.

H **[38]** Accordingly the plaintiffs' pleaded causes of action against the defendants are for:

(a) breach of constitutional duty on the part of the defendants;

(b) violation of fundamental liberties under Part II of the Federal Constitution;

I

(c) fraud;

(d) deceit;

(e) conspiracy; and

(f) the tort of misfeasance by a public officer. A

[39] The plaintiffs contended that the learned judge was wrong in allowing the defendants' application to strike out the writ because:

(a) this is clearly not a 'plain and obvious' case to struck out as it involves 'difficult and novel constitutional issues' which can only be determined after a full trial; B

(b) the plaintiffs' causes of action cannot be the subject matter of an Election Petition as they involved, inter alia, breaches by the defendant of their constitutional duties and obligations; C

(c) the remedies sought in the civil suit can never be granted by an election court because of the nature of the reliefs pleaded in the plaintiffs' statement of claim (see p 5 of this judgment). D

[40] The issue before us is essentially one of jurisdiction, that is whether the High Court has the *jurisdiction* to quash an election petition by way of a writ action where a breach of constitutional duty and fundamental liberties is alleged against the Elections Commission (ie the defendants) and fraud, deceit, conspiracy and misfeasance by a public officer is alleged. E

[41] In our view it is unequivocally clear from the language of art 118 of the Constitution, that in Malaysia an election can only be questioned by an election judge trying an election petition. As submitted by learned senior federal counsel ('SFC') art 118 is 'couched in imperative and absolute terms' (see para 23 of this judgment). F

[42] The effect of the aforesaid provision is that the High Court is excluded from exercising any jurisdiction over all matters that call into question an election be it to the House of Representative or to the State Assembly. G

[43] Based on s 32 read together with s 33(1) of the Elections Offences Act 1954 (the law pertaining to election petition) an election petition is to be tried by an election judge which under the said Act is defined as a judge of the High Court nominated by the Chief Judge to try an election petition. H

[44] The Supreme Court in *Election Commission, Malaysia v Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716 stated in no uncertain terms that:

> Any dissatisfaction with or challenge to an election should be brought by way of an election petition before an election judge and nowhere else. I

[45] The plaintiffs sought to argue that their pleaded causes of action, inter alia, breaches of the Constitution, fraud, deceit, conspiracy and misfeasance by

a public officer cannot be the subject matter of an election petition as the latter is limited in its scope both as to the causes of action and the remedies available.

[46] However, as the plaintiffs themselves admitted in their written submission, the essence of their complaint in the civil suit is the absolute abuse or misuse of indelible ink by the Elections Commission (ie the defendants) 'which resulted in multiple voting on a substantial scale, which in turn caused about 43 parliamentary seats to be fraudulently counted to the detriment of the plaintiffs'.

[47] The plaintiffs, vide their civil suit is in effect calling into question or rather challenging the results of the GE13. The plaintiffs' claim therefore falls squarely within the scope of art 118 and as such can only be brought by way of an election petition to be heard by an election judge and not by way of a civil suit to be adjudicated upon by a judge in the exercise of his or her ordinary civil jurisdiction.

[48] We agree with the learned SFC that the mere pleading of the causes of action cannot purport to confer jurisdiction on the High Court as the effect of these causes of action and the reliefs sought is to call into question the elections (ie GE13) which by virtue of art 118 is vested solely with the election court. Any attempt to confer jurisdiction on the High Court by pleading such causes of action would amount to a violation of art 118.

[49] In this regard we agree with the learned judge that the case of *Union of India v Association for Democratic Reforms* [2002] 5 SCC 294 cited by the plaintiffs in support of their case can be distinguished. The aforesaid case concerns a voter's right to information about a candidate standing for elections and the parties they represent. It was not a case which questioned the elections or the results of the election.

[50] The Supreme Court rightly held that the High Court had the necessary powers under art 226 of the Indian Constitution (which is in pari materia with para 1 of the Schedule of the Courts of Judicature Act 1964) to make an order that for voters to make a right choice it is essential that the history of the candidates be disclosed to the voters and for this purpose the Elections Commission is empowered to issue the directions as ordered by the High Court judge.

[51] Our position as enshrined in art 118 is similar to the position in India where art 329(b) of the Constitution of India provides as follows:

Notwithstanding anything in their Constitution

(a) ...

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election presented to such authority and in such manner as may be provided for by or under any law made by the appropriate authority.

[52] The Indian Supreme Court's observation on the scope and effect of art 329(b) in *NP Ponnuswami v Returning Officer Namakkal Constituency, Namakkal, Salem Dist And Four others* is instructive for our purpose:

> Article 329(b) ... was primarily intended to exclude or oust the jurisdiction of all courts in regard to electoral matters and to lay down the only mode in which an election could be challenged.

[53] There the appellant had moved the High Court under art 226 of the Indian Constitution for a writ of certiorari to quash the order of the returning officer rejecting his nomination papers and to direct the returning officer to include his name in the list of valid nominations to be published. The High Court dismissed the appellant's application on the ground that it had no jurisdiction to interfere with the order of the returning officer by reason of the provisions of art 226 of the Constitution.

[54] The appellant contended that the view expressed by the High Court is not correct, the jurisdiction of the High Court is not affected by art 329(b) of the Indian Constitution and that he was entitled to a writ of certiorari in the circumstances of the case.

[55] The Supreme Court, dismissed the appeal holding that the improper rejection of a nomination paper is a ground on which an election may be called into question and therefore by virtue of art 329(b) the only mode provided for such a challenge was by way of an election petition.

[56] One of the reliefs sought by the plaintiffs in the present case is a declaration that the results announced by the defendants for *all the 222 parliamentary seats* should be declared null and void, and hence an order setting aside the results of all the said 222 seats.

[57] The plaintiffs' suit is premised on the alleged misuse of the indelible ink which they claimed resulted in Pakatan Rakyat losing the GE13 by approximately 43 seats with narrow majorities of less than 10% of the vote. They further contended that the 'massive cheating caused by the washing away of the indelible ink destroyed the integrity of the entire voting process of GE13. It vitiates the results of GE13' (see paras 76–81, pp 122–123 of the record of

appeal, *Bahagian A*).

[58] Learned counsel for the plaintiffs, Mr T Thomas argued that as the plaintiffs here are seeking to nullify the entire results of GE13 they could not do so by way of an election petition. According to learned counsel, the true effect and scope of art 118 is that any challenge to an election result in a *specific constituency* for a parliamentary seat or a state seat must be by way of an election petition to any election court. This includes challenges to an election result in both general elections and by-elections.

[59] Thus, where in this case the plaintiffs are seeking to challenge the entire results of the GE13, art 118 cannot apply and recourse can only be had by filing an action in the High Court to declare the GE13 null and void.

[60] We are unable to agree with learned counsel's submission. We would only refer to the judgment of the Indian Supreme Court in *Indrajit Barua v Election Commission of India* AIR 1984 SC 1912 where the Supreme Court, in dismissing a petition to nullify the elections on the ground that the holding of elections on the basis of the void electoral rolls of 1979 was contrary to law and vitiated the elections, held as follows:

> In the first place, Art 329(b) of the Constitution bars any challenge to the impugned elections by a writ petition under Art 226 as also on the ground that the electoral rolls on the basis of which the impugned elections were held were invalid. The petitioners sought to escape from the ban of Art 329(b) by contending that they are challenging the impugned elections as a whole and not any individual election and that the ban of Art 329(b), therefore, does not stand in the way of the writ petitions filed by them challenging the impugned elections. But we do not think this escape route is open to the petitioners. There is in the Representation of the People Act, 1951, no concept of elections as a whole. What that Act contemplates is election from each constituency and it is that election which is liable to be challenged by filing an election petition.
>
> It may be that there is a common ground which may vitiate the elections from all the constituencies, but even so it is the election from each constituency which has to be challenged though the ground of challenge may be identical. Even where in form the challenge is to the elections as a whole, in effect and substance what is challenged is election from each constituency, and Art 329(b) must, therefore, be held to be attracted.

[61] We are of the view that the legal position vis a vis art 329(b) of the Indian Constitution read together with the Representation of the Peoples Act 1951 as lucidly enunciated by the Supreme Court (above) applies equally here based on the equipollent provisions of art 118 of our Constitution and the Elections Offences Act 1954. What art 118 and the Elections Offences Act 1954 contemplate is election from each constituency and it is that election which is liable to be challenged by filing an election petition. As observed by the

Supreme Court even where in form the challenge is to the elections as a whole, in effect and substance what is challenged is election from each constituency, and, in our case, art 118 must therefore be held to be attracted.

[62] In fact this was alluded to by the learned High Court judge when she held that 'the proper and correct method in challenging the said election is through an election petition presented separately to the election court where the respective election was held and not by way of the present action where the plaintiffs are seeking to declare all the 222 seats of Parliament and the entire 13th GE as null and void'.

[63] Finally learned counsel sought to argue that, even if the court does not have the jurisdiction to grant the order declaring the GE13 null and void, the court has the jurisdiction to grant the first two declarations sought for by the plaintiffs which in his view are 'self-standing'.

[64] The first two declarations sought by the plaintiffs are as follows:

> 1. A Declaration that each of the Defendants, whether acting individually or collectively as the EC, jointly or severally, failed in their constitutional duty and obligation to properly conduct the 13th General Elections; and
>
> 2. A Declaration that each of the Defendants, whether acting individually or collectively as the EC, maliciously and dishonestly practiced a fraud on the electorate of Malaysia by the misuse of indelible ink for voting in GE13.

[65] We find, with respect, learned counsel's argument untenable. We agree with learned SFC that prayers (1) and (2) cannot stand independently. The ultimate effect of these orders would be to render the GE13 null and void and as such would attract the provisions of art 118 of the Constitution.

[66] In the light of our finding above we do not think it necessary to express our view on the defendants' submission that as the jurisdiction to question an election is not known to the common law and equity the plaintiffs cannot avail themselves to any of the common law tortious cases of action.

Second issue

(ii) Whether the principle in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 to mould the relief in accordance with the demands of justice applies in this case.

[67] It is the plaintiffs' contention that the learned judge erred in holding that the principle in *R Rama Chandran* does not apply in the present case.

[68] In our view the learned judge did not err in holding as such. As submitted by learned SFC the Federal Court when enunciating the principle was dealing with a case where the High Court was exercising its supervisory jurisdiction under s 25 read together with Para 1 of the Schedule to the Courts of Judicature Act 1964 . The Federal Court held that the High Court in certiorari proceedings not only had the power to quash the impugned decision but could mould the relief in accordance with the exigencies of the situation in order to satisfy the demands of justice.

[69] In the instant case these is no question of the court exercising its power to mould the relief as the court does not in the first place, have the jurisdiction to hear the matter.

Third issue

(iii) Whether the High Court has jurisdiction to make an order removing the members of the Elections Commission (ie the defendants) from their office.

[70] On this issue too we have no reason to disagree with the learned judge's finding. It is clear from art 114(3) of the Federal Constitution that the High Court does not have the jurisdiction to remove members of the Elections Commission from their office.

[71] Article 114(3) provides that members of the Elections Commission can only be removed from office on the like grounds and manner as that of a judge of a Federal Court. Article 114(3) reads thus:

> A member of the Election Commission shall cease to hold office on attaining the age of sixty-six years or on becoming disqualified under Clause (4) and may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong, but shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court.

[72] The manner in which a judge of the Federal Court can be removed from office is provided for under art 125(3) of the Federal Constitution which states as follows:

> If the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Federal Court ought to be removed on the ground of any breach of any provision of the code of ethics prescribed under Clause (3b) or on the ground of inability, from infirmity of body or mind or any other cause, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with Clause (4) and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.

[73] Thus, as with a judge of the Federal Court the jurisdiction to remove members of the Elections Commission is vested with the Yang di-Pertuan Agong acting on the recommendation of the tribunal set up for that purpose. The High Court therefore does not have any jurisdiction to make an order for the removal of the defendants from their office.

[74] In any event it is our view that this issue is contingent upon whether the court finds it has the jurisdiction to hear the matter. As found by the learned judge the alleged breach of constitutional duty by the defendants and other alleged wrongdoing as pleaded merely provide the foundation upon which the plaintiffs are challenging the validity of the GE13.

[75] As such art 118 would apply and the High Court is bereft of any jurisdiction to hear the matter. That being the case the issue of whether the court has the jurisdiction to remove members of the Elections Commission from office does not really arise.

CONCLUSION

[76] For the above reasons we find the learned judge was correct in holding that the court did not have the jurisdiction to hear the plaintiffs' suit and it ought therefore to be struck out for being vexatious, frivolous and an abuse of the process of court.

[77] We accordingly, by a majority, dismiss the appeal and affirm the learned judge's decision. We make no order as to costs. The deposit is refunded.

Prasad Abraham JCA (dissenting):

[78] This appeal arose out of a decision of the learned judge in Kuala Lumpur High Court, striking out the appellant's claim in its entirety with costs. The appellants appealed to this court, and by a majority judgment delivered on 17 September 2014 the appeal was dismissed. I dissented and allowed the appeal.

[79] Before I deal with Her Ladyship's judgment in the Kuala Lumpur High Court, let me first refer to the relief sought in the plaintiff's statement of claim found in (p 127 of the appeal record *Bahagian A* Vol 1/8). The first two reliefs sought are declaratory reliefs and the rest are consequential relief. The thrust of the relief sought was to set aside the 2014 General Elections and nullify the same and for the seeking of the removal of Election Commission Members, amongst the other relief sought. In the application to strike out the appellant's pleading, the respondents argue that the relief sought was to avoid the General Election results in 2014 and for removal of the members of the Election

Commission. It was argued that the election results could only be set aside through an election petition and the dismissal of Election Commission members was clearly provided for in the Federal Constitution. It follows that since the relief sought is unsustainable, the suit should be struck out.

[80] This argument appears to have found favour with the learned judge in her grounds of judgment (see pp 33–38 of the appeal record), the learned judge predicated her reasoning on art 118, of the Federal Constitution and accordingly struck out the appellant's statement of claim and dismissed the appellant's claim.

[81] Before this court, the same arguments were presented. Bearing in mind that this was an application to strike out the appellant's claim and the duty of the court was to save the pleadings by amendment rather than striking out, (see *Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557 (CA)), I considered the relief prayed for in prayer (1) of the statement of claim. Here the appellants was seeking purely declaratory relief in terms of the exercise of the constitutional powers and duties of the respondents under the Federal Constitution read together with the Election Act 1958 and Regulations. In my judgment prayer (1) can stand on its own, seeking a declaratory order without any consequential relief. It would follow that all the appellants would obtain is a declaration on whether the respondents were in breach of their constitutional duties in the conduct of elections. It is a sustainable argument to advance, that whilst it is open to mount a claim against the respondents on this basis, but where the election process is challenged and where an election result is to be avoided, then only you must proceed through an election petition. I refer also to *Election Law, Practice and Procedure* (1st Ed) V S Rama Devi & S K Mendiratta at pp 88–189 and I quote:

> The responsibility of superintendence, direction and control of the conduct of elections may cover powers, duties and functions of many sorts, administrative or other depending upon the circumstances Article 324, on the face of it, vests vast functions in the commission which may be powers or duties, essentially administrative and marginally on its plenary character in the exercise of its powers. Firstly, when Parliament or any state legislature has made valid law relating to or in connection with elections, the commission shall act in conformity with, not in violation of, such law. But where such law is silent, art 324 is a reservoir of power for the commission to act for the avowed purpose of pushing forward, but not divorced from, a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay in action in the mist important area of the constitutional order, namely, elections.
>
> The Supreme Court also observed in that case that arts 327 and 328 which empower Parliament to make laws with regard to electoral matters are subject to the

provisions of the Constitution which include art 324. The Court observed that: A

> The framers of the Constitution took care to leaving scope for exercise of residuary power by the Election Commission in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen or anticipated with precision. That is why there is no hedging in Art 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. The seems to be the raison deter for the opening clause in Arts 327 and 328 which leaves the exercise of powers under Art 324 operative and effective when it is reasonably called for in a vacuous area. Where the existing laws are absent and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hand and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly in a free and fair manner'. B C D

[82] The Federal Constitution, being the Supreme Law of the Federation imposes a constitutional duty on the respondents to conduct elections in accordance with art 113(i) of the same. Read together with the Elections Act 1958 and Regulations (Act 19), an act that was promulgated for conduct of Elections to the Dewan Rakyat and to the Legislative Assemblies of the respective states ('the said Act'). Under sub-s (1) of the said Act (a) under the heading general powers and duties of the Election Commission it is provided and I quote: E F

> (i) The Election Commission shall:
>
> (a) Exercise control and supervision over the conduct of elections and the registration of electors on the electoral rolls, and shall enforce on the part of all election officers fairness, impartiality and compliance with Part VIII of the Constitution and this Act and any regulations made thereunder; G

[83] It is open for the appellants to raise by way of a declaration whether the respondent had breached their constitutional duty to conduct the General Elections of 2014 with fairness. At any rate this is an important issue that should not be summarily disposed of. H

[84] The other point raised by the respondents is despite prayer (1) of the statement of claim being couched in declaratory terms, its thrust was to avoid the election results despite an absence of consequential relief. In my judgment, seeking a declaration of rights without consequential relief should be encouraged since the law under s 41 of the Specific Relief Act 1950 allows the same and I quote: I

> 41. Any person entitled to any legal character, or to any right as to any property, may

institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the Plaintiff need not in that suit ask for any further relief:

> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[85] Reference is also made to the decision of the Federal Court in case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 and to the judgment of Raja Azlan Shah by Ag CJ (as His Royal Highness then was) at pp 148–149 and I quote:

> In the first place it must be made clear that the existence of a statutory remedy is no bar to an action for a declaration. This case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies to an action for a declaration: see *Pyx Granite* (ante). Secondly, all that a declaration does is to declare the rights of the parties, and the effect of making a declaration would be that it would give the Land Executive Committee an opportunity of having second thoughts at the problem.

[86] In the light of the aforesaid it is my finding that this is not a fit and proper case for summary disposal by way of O 18 r 19 of the Rules of Court 2012.

[87] For the aforesaid reasons I allowed the appeal in part:

(a) the order of the High Court is varied to allow the appellant's claim in terms of prayer (1) only of the statement of claim of the appellants to be reinstated;

(b) the matter is remitted back to the High Court for case management;

(c) parties be at liberty to amend their respective pleadings; and

(d) costs of the application be costs in the cause.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar